No. 15-2398

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

LILY TRANSPORTATION CORPORATION,

Respondent-Appellee.

On Application For Enforcement Of An Order
Of The National Labor Relations Board

Respondent-Appellee's Reply Brief

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Dated: November 1, 2016

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INTRODUCTION

In total disregard of the only record evidence that 18 out of 20 drivers did not want to be represented by the Union and that the reasons for the drivers' disaffection arose prior to Lily's arrival, the National Labor Relations Board (the "Board") asks this Court to affirm that it has the authority to use a successor bar (an irrebuttable/conclusive presumption) to force Lily's drivers to accept the Union as their representative for up to a year. The Court should not enforce the Board's decision because it relies on a successor bar that violates the Act's express requirement that the Board's findings be supported by substantial evidence (in Section 10(e) and (f) and that employees have the right to refrain from collective action (in Section 7). Moreover, the Board's suggestion to this Court that Lily waived its arguments is without legal merit.

ARGUMENT

I. The Board's Irrebuttable/Conclusive Successor Bar Is Arbitrary and Violates the Act.

A. By applying the successor bar, the Board ignored the record evidence and its decision is arbitrary and not supported by substantial evidence on the record as a whole.

Although there is no dispute that Lily is a successor employer, based on that singular fact alone, the Board imposed liability on Lily while ignoring the undisputed evidence that a majority of the employees (18 out of 20) rejected the Union's representation for reasons that arose before Lily had any involvement with

the drivers. The Board's application here of a successor bar is inherently inconsistent with, and in violation of, the Act's requirement that decisions of the Board must be supported by substantial evidence on the record as a whole. (Section 10(e) and 10(f) provide: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.") This Court should not countenance the Board's establishment and use of a successor bar which allows the Board to evade the Congressionally mandated requirement of ensuring that its decisions are supported by substantial evidence.

This Court previously rejected such an approach in Big Y Foods, Inc. v. NLRB, 651 F.2d 40 (1st Cir. 1981), which the Board now attempts to distinguish from this case. In Big Y Foods, this Court declined to enforce Board's order because the Board's application of an irrebuttable presumption regarding a bargaining unit was inconsistent with the Board's statutory duty to make a determination of the appropriate unit in a representation case. Big Y Foods, 651 F.2d at 45-46. Board Brief at 25. The Board attempts to distinguish Big Y Foods based on the language in Section 9 of the Act that requires that decisions be made "in each case." The Board argues that it was that language that precluded the application of an irrebuttable presumption, and that this reasoning in Big Y Foods

is inapplicable in the context of an unfair labor practice charge determined under Section 10. Board Brief at 25.

The Board's argument ignores the Board's parallel statutory duty in unfair labor practice proceedings. Under Section 10(c), the Board is required to make its determination in an unfair labor practice case based on "the preponderance of the testimony" and pursuant to Section 10(e) of the Act, the Board's findings of fact must be supported by "substantial evidence on the record considered as a whole…." (emphasis added).

Thus, in the circumstances found in both Big Y Foods and in the current matter, the Board must base its decision on record evidence and not on an irrebuttable presumption. Accordingly, this Court's admonition in Big Y Foods against the Board's use of an irrebuttable/conclusive presumption on which to base its finding is not only applicable to the current matter, it should be dispositive.

The decision in this case presents a particularly egregious violation of the Board's obligation to establish its case by substantial evidence. Not only does the Board impose on Lily the obligation to recognize and bargain with the Union without substantial evidence, but it compounds that error by applying Lee Lumber & Bldg. Material Corp., 322 NLRB 175 (1996), to conclude that Lily's failure to bargain "tainted" the employees' written rejection of the Union even though the Board presented absolutely no evidence that this was true. Indeed, the

Administrative Law Judge ("ALJ") specifically found, and the Board adopted, that Lily did not engage in any conduct "designed to threaten, restrain, or coerce its employees." Addendum at 8. There is simply no support for any finding that Lily's failure to recognize the Union upon its arrival at Toyota played any part in the drivers' overwhelming rejection of the Union just weeks later. In the absence of any other factor that could justify such an inference, the Board's finding that Lily's action tainted the drivers' rejection is without substantial evidence and must be rejected.

The Board's reliance on its Lee Lumber presumption to conclude that Lily's refusal to recognize the Union in a brief telephone conversation in late November 2013, tainted the employees' petition rejecting the Union, signed by drivers just weeks later, lacks the required substantial evidence basis. The Lee Lumber presumption is not rational because, as this case illustrates, there is no "sound and rational connection between the proved and inferred facts." Lee Lumber & Bldg. Material v. NLRB, 117 F.3d 1454, 1459 (D.C. Cir. 1997) (quotations omitted).

The connection between the proved and inferred facts supporting the presumption in Lee Lumber, which did not involve a successor situation, was that in addition to specific activity by the employer found to be a violation of Section 8(a)(1), the lengthy delays in bargaining caused by an employer's refusal to bargain will foreseeably result in the loss of union support even without the

employees' knowing about the employer's refusal to bargain. See Lee Lumber, 117 F. 3d at 1459. None of those facts are present in this case. There was no delay at all, and the employees submitted their petition rejecting the Union within weeks of Lily's commencing operations at the Toyota facility. There was simply no factual basis whatsoever to support the presumption that the employees were even aware of the communication between Lily and the Union or that this knowledge played any part in the employees' exercise of their statutory right to reject the Union as their representative.

The Board's decision is a clear violation of its duty to make findings based on substantial evidence. See NLRB v. International Brotherhood of Teamsters, Local 251, 691 F.3d 49, 55 (1st Cir. 2012) ("In considering whether a conclusion is supported by substantial evidence, '[w]e must take contradictory evidence in the record into account.' Howard Johnson Co. v. NLRB, 702 F.2d 1, 2 (1st Cir. 1983) (quoting Universal Camera v. NLRB, 340 U.S. 474, 487-88 (1951). Thus, the Board 'is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands.' Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 378 (1998).")

The creation of a successor bar inherently allows the Board to evade its Congressionally mandated obligation to prove unfair labor practices by substantial evidence on the record as a whole. The undisputed facts of this case present a

compelling case for declining to allow the Board to use that bar to evade its responsibility to prove the case by substantial evidence. Thus, enforcement of the Board's order must be denied.

B. The Board's flip-flopping on the successor bar (an irrebuttable/conclusive presumption) precludes deference.

In an effort to support the Board's current successor bar and show that it is not arbitrary, the Board seeks to justify its current position by citing an increase in mergers and acquisitions. However, this explanation is nothing new. Rather, it is exactly this type of arbitrary application of different rules to the same set of circumstances that mandates this Court decline to give deference to the Board's rules.

Where the Board simply changes a rule without pointing to any "significant developments in industrial life believed by the Board to have warranted a reappraisal of the question," its decision does not warrant the usual deference. Paintsmiths v. NLRB, 620 F.2d 1326, 1333-34 (8th Cir. 1980). The Board's current reliance on its decision in UGL-UNICCO, 357 NLRB No. 76 (2011) with no further explanation does not resolve the issue. Even taking as true the Board's assertion in UNICCO that there has been an increase in mergers and acquisitions over the years, the Board has not articulated why or how such an increase justifies the creation of a successor bar. Indeed, it is not a change in substance or underlying facts that itself justifies rejection of a prior rule that arose under the

same circumstances. This purported change in volume, which was not supported by any evidence in this case, does not explain why the change in the rebuttability of the presumption is necessary or appropriate now.

Moreover, the Board itself acknowledged in UGL-UNICCO that such increases were occurring over the "last 35 years" and had been addressed by the Board's prior successor cases such as St. Elizabeth Manor, 329 NLRB 341, 343 (1999), and MV Transportation, 337 NLRB 770, 775 (2002). UGL-UNICCO, 357 NLRB No. 76 at 5 n. 16-17 (2011). In other words, the increase is nothing new, and there was no such merger or acquisition involved in this case.

The Board's statements that its previous rebuttable presumption does not best serve the Act's purposes is not sufficient to make it true or entitled to deference. It simply shows that the Board repeatedly changes its view about serving the purposes of the Act. This arbitrary application of different rules to the same facts requires rejection of any deference that would otherwise be due to the agency's decision.

Without deference to the Board's rule of irrebuttability, the Court must conclude that a rebuttable presumption such as that applied in NLRB v. Burns Security Services, 406 U.S. 272 (1972), and Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987), protects labor stability without sacrificing employees' free choice. An irrebuttable presumption eliminates the ability to balance the primary

purposes of protecting employee free choice and maintaining labor stability because it precludes consideration of the actual facts and circumstances. For instance, in this case, employees' disaffection with the Union had nothing to do with the successorship transaction; the employee disaffection arose long before Lily arrived on the scene as a result of the Union's actions (or lack of action) when Pumpernickel was the drivers' employer. The drivers' decision to reject the Union in such circumstances should be respected rather than automatically disregarded.

Furthermore, the Board's reliance on Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984), is misplaced. Chevron involved one flip – a change from one policy to another. The policy involved in UGL-UNICCO is the Board's third attempt to create a successor bar – the sixth flip. The Board has offered nothing new, and merely repeats the rationale given in prior cases for its most recent iteration of the successor bar.

The Board's decision in UGL-UNICCO as applied to this case reflects a lack of reasoned decision-making that violates the Board's substantial evidence obligation and the rights of employees under Section 7 to refrain from collective representation.

II. Under the Board's Decision in Levitz, The Board Erred In Finding that Lily Did Not Show Loss of Majority Support for the Union.

In Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), the Board held that an employer that receives a petition signed by a majority of unit employees showing lack of support for the union would "have a good case" in the absence of the union's assertion of contrary evidence. See Levitz at 725. This is the standard applied by the Court of Appeals for the Fourth Circuit in NLRB v. B.A. Mullican Lumber & Mfg. Co., 535 F.3d 271, 279 (4th Cir. 2008), in which the Court held that a petition signed by employees was sufficient to show lack of majority support despite the lack of authentication when the General Counsel provided no controverting evidence that the signatures were not authentic. Lily indisputably satisfied the standard in Levitz when it presented the petitions signed by 18 of 20 drivers and there was no evidence presented that the employees' signatures were not authentic or that the petitions did not represent the employees' free choice.

The Board's reliance in its brief on Ambassador Services, Inc., 358 NLRB No. 130 (2012), and Latino Express & Teamsters Local 777, 360 NLRB No. 112 (2014), for the proposition that a petition signed by a majority of unit employees alone is never enough to satisfy the standard in Levitz in the absence of additional evidence to authenticate employees' signatures, is misplaced. Those cases involved numerous questions about, for instance, the signatures of employees, the timing during which they were collected, whether the signatures were coerced, and

the number of employees in the units in question. See Latino Express, 360 NLRB No. 112 at 16 n. 20 (the ALJ pointed out that the employer failed to authenticate signatures "in circumstances where significant contradictions dog[ged] the testimony of petition solicitors regarding the solicitation process.").

No such comparable facts exist here, where 18 of 20 drivers submitted their petitions to Walsh, who had worked with most of them prior to Lily's arrival at the Toyota facility. In addition, at the hearing evidence about the identities of the drivers on Lily's payroll was introduced by the General Counsel, which confirmed that the names on the petition were the same as those identified as Lily's drivers. APP-316. Gittlen, the Union's Area Director, testified that he took no steps to verify whether the drivers' signatures were authentic. APP-079. There was no basis to question the number of drivers in the unit, whether the 18 drivers who signed the petition represented an actual majority of the drivers, the timing at which the petitions were submitted, or any other ambiguities about the authenticity of the petitions or the signatures.[1/]

[1/] Notably, no such "authentication" of signatures was required when Pumpernickel voluntarily recognized the Union based on employees' submissions of authorization cards. Automatically requiring authentication of petition signatures is also inconsistent with the Board's standard for evaluating the validity of employee authorization cards: "Although authorizations should be examined on their face (to check, for example, for signatures which appear to be in the same handwriting), their validity should be presumed unless called into question by the presentation of objective evidence." NLRB Case Handling Manual § 11027.1.

Lily had no reason to offer evidence of the authenticity of drivers' signatures as there was no challenge to those signatures at the hearing.

III. This Court Has Jurisdiction To Hear Lily's Arguments

The Board argues in its brief that this Court lacks jurisdiction under Section 10(e) of the Act to decide two of the issues raised by Lily in its opening brief: (i) that the Union was not a proper representative of the employees as Lily provided the Board with unrebutted evidence of a lack of majority employee support of the Union through statements signed by an overwhelming majority (18 of the 20) of the unit's employees (the "Levitz Furniture issue"), and (ii) that the irrebuttable presumption of unlawful anti-union taint under Lee Lumber should not apply as any application of that presumption is not based on substantial evidence and is inconsistent with the Act (the "Lee Lumber issue"). The Board argues that Lily's alleged failure to raise these issues to the Board by filing a post-Decision motion for reconsideration bars this Court from considering them. See Board Brief at 10 n. 4, 28 n. 12, & 33-34. There is no merit to the Board's procedural bar argument for multiple reasons.

A. Lily Had No Obligation To Raise In A Motion For Reconsideration Issues That Did Not Affect The Outcome Of The Board's Decision.

In its Decision, the Board upheld the ALJ's mechanical application of the conclusive successor bar doctrine from UGL-UNICCO to conclude that Lily was

obligated as a successor employer to bargain with the Union, which accordingly resulted in the Board adopting all of the ALJ's recommended remedies against Lily (with minor changes simply to reflect the Board's standard remedial language). The Board's determination of liability and remedy did not rely in any way on the application of either Levitz Furniture or Lee Lumber to the facts of the current matter. Instead, in footnotes 3 and 4 of its Decision, the Board states that even if the Board were to overrule the UGL-UNICCO conclusive successor bar (which clearly the Board has no current intention of doing), Lily's arguments would appear to fail under Levitz Furniture and Lee Lumber.

Motions for reconsideration to the Board, according to the Board's regulations, are to be filed only in "extraordinary circumstances" to raise a "material error" in a Board decision. See 29 CFR § 102.48(d)(1). In order to preserve an issue for appeal, an employer is under no obligation to file a motion for reconsideration with the Board on an issue when such a motion "would have been an 'empty formality.'" See Trump Plaza Associates v. NLRB, 679 F.3d 822, (D.C. Cir. 2012), quoting Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 727 F.2d 1184, 1192 (D.C. Cir. 1984).

Any motion for reconsideration in this matter by Lily about the two footnotes would have been an "empty formality" since even if Lily had prevailed before the Board on such a motion for reconsideration, it would not have changed

in any way the Board's ultimate liability and remedy findings against Lily in the Decision – which were not based on Lee Lumber or Levitz but on the Board's mechanical application of the conclusive successor bar doctrine from UGL-UNICCO.

Further, Board conclusions that are only found in *dicta* are inherently not "material" as they are not essential to either the liability or the remedy findings in that decision, and thus are not a proper subject for a motion for reconsideration. The contents of these footnotes are the very essence of *dicta* in that they are observations that are not essential to either the ultimate findings of the Decision as to Lily's liability (under the UGL-UNICCO conclusive successor bar) or as to the resulting remedies based on the conclusive successor bar. See Arcam Pharmaceutical Corporation v. Faria, 513 F.3d 1, 3 (1st Cir. 2007) (*Dictum*/*dicta* are statements in a decision that are not "essential to the result reached" and thus "constitutes neither the law of the case nor the stuff of binding precedent"), quoting Rossiter v. Potter, 357 F.3d 26, 31 (1st Cir. 2004) and Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992).

Indeed, this Court has noted that *dicta* is by definition "superfluous" - which is, of course, the very opposite of being material. See Arcam Pharmaceutical Corporation, 513 F.3d at 3 ("Dictum is superfluous content"), citing Pierre N.

Leval, Judging Under the Constitution, Dicta about Dicta, 81 N.Y.U. L. Rev. 1249, 1256 (2006).

Accordingly, as Lily had no obligation to raise in a motion for reconsideration issues that were raised by the Board as *dicta* in footnotes that had no impact on the outcome of its Decision, these issues may be considered by the Court in this appeal.[2/]

B. The Board Was Sufficiently Appraised That The Arguments Raised By Lily To This Court Might Be Pursued On Appeal

Although the argument above is dispositive on the waiver issue, an employer in any case need not file an objection or a motion for reconsideration on a particular issue as long as "the objections made before the Board were adequate to put the Board on notice that the issue *might* be pursued on appeal." Trump Plaza Associates, 679 F.3d at 829-830 (emphasis added by Court), quoting Consolidated Freightways v. NLRB, 669 F.2d 790, 794 (D.C. Cir. 1981); accord NLRB v. Saint-Gobain Abrasives, Inc., 426 F.3d 455, 459 (1st Cir. 2005) ("The test is whether the objection, fairly read, appraises the Board that the objector intended to pursue the issue presented to the Board.")

[2/] Lily also notes that the Board's position appears to be at odds with one of its regulations - 29 CFR § 102.48(d)(3) ("A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies."); accord 29 CFR § 102.65(e)(3) (the same provision applies in the context of a hearing under Section 9(c) of the Act).

In the current matter, the objections "were adequate to put the Board on notice" of both of the issues that the Board now seeks to exclude.

i. The Levitz Furniture Issue

The Board argues that Lily did not sufficiently appraise the Board that it might pursue on appeal an argument that the signed statements from the drivers were sufficient evidence that the Union lacked majority support. Board Brief at 10 n. 4 & 33.

However, the Board's Decision repeatedly notes that Lily made this very argument to the Board. See Decision at 1 ("The Respondent argues, as it did to the judge, that any bargaining obligation that it had should have ceased in December 2013 when it received signed statements from a majority of the drivers stating that they no longer wished to be represented by the Union.); Decision at 2 ("we reject the Respondent's argument that any bargaining obligation that it had ceased when it received the employees' statements that they no longer wished to be represented by the Union.")

In addition, Lily's argument to the Board that the signed statements by the drivers demonstrated a lack of Union support necessarily includes an argument that the Board incorrectly applied the evidence standards for the use of such statements under Board precedent including Levitz Furniture. See, e.g. Trump Plaza Associates, 679 F.3d at 830 ("Trump Plaza's argument that the mock card-check

was adequately disseminated to affect the election necessarily includes the argument that it was adequately disseminated under Board precedent.")

Finally, the Board was also notified of the Levitz Furniture issues raised by the statements signed by the drivers in the brief (at page 3) filed by the Board's General Counsel in support of its exceptions, which argued that the signatures were inadmissible. It is settled law that Lily can raise on appeal an issue that the General Counsel has raised in its submissions to the Board. See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665 (1982) (for an issue to be preserved it must be "raised during the proceedings before the Board, either by the General Counsel or by [the employer]."); e.g., Bath Marine Draftsmen's Association v. NLRB, 475 F.3d 14, 24 (1st Cir. 2007) (when the General Counsel's brief to the Board argues an issue, then the Board has adequate notice that both parties before the Board believed that this "issue was before the Board, and therefor the issue was preserved for appeal" even when the party raising this issue on appeal did not file an exception on this issue to the Board); Trump Plaza Associates, 679 F.3d at 829-830 (statements in a union brief filed with the Board with its exceptions are used in determining "whether the objections made before the Board were adequate to put the Board on notice that the issue *might* be pursued on appeal" by the employer).

ii. The Lee Lumber Issue

The Board also argues that Lily did not sufficiently appraise the Board that it might argue on appeal that it was invalid to apply the presumption of taint contained in Lee Lumber. Because this argument is only found in a footnote of the Board's brief, it is waived. See United States v. Castro-Vazquez, 802 F.3d 28, 37 n. 6 (1st Cir. 2015) ("We have repeatedly held that arguments raised only in a footnote … are waived."), quoting National Foreign Trade Council v. Natsios, 181 F.3d 38, 60 n. 1 (1st Cir. 1999).

Moreover, the Board's General Counsel raised to the Board an exception specifically requesting that the Board apply the Lee Lumber presumption of preclusive taint. See APP-449 (Counsel for the General Counsel's Limited Exceptions to the Decision of the Administrative Law Judge ("The Administrative Law Judge's failure to conclude, as a matter of law, that Respondent's unremedied unlawful refusal to recognize and bargain with the Union precludes Respondent from relying on purported evidence of employee disaffection to challenge the Union's representative status.")).

In response, Lily filed with the Board on March 6, 2015 a written Opposition to this exception by the Board's General Counsel. APP-455. In this Opposition (at page 2), Lily argued that the Lee Lumber "presumptive taint of employee disaffection should not apply here." APP-455. Thus, the propriety of applying a

Lee Lumber presumption to this matter was very much put at issue before the Board in the parties' exception submissions.

Accordingly, Lily has shown that with respect to its challenge in this Court on the Board's finding of taint based on Lee Lumber "the objections made before the Board were adequate to put the Board on notice that the issue *might* be pursued on appeal."

CONCLUSION

For all of the foregoing reasons, this Court should deny the Board's request for enforcement and grant Lily such additional relief, including an award of attorney's fees and costs, as is just and proper.

Respectfully submitted,

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Dated: November 1, 2016

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,303 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface known as 14-point Times New Roman.

/s/Katherine D. Clark
Katherine D. Clark

CERTIFICATE OF SERVICE

I hereby certify that I filed this Brief through the Court's Electronic Case Filing (ECF) system on November 1, 2016. I hereby certify that the following parties are registered as ECF filers and that they will be served by the ECF system and will receive two copies of the Brief pursuant to Fed. R. App. P. 31(b):

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